Supreme Court, U.S.
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No. 86-1144

In The
Supreme Court of the United States
October Term, 1986

THE CITY OF MONTGOMERY, *et al.*,
Petitioners,

vs.

STEPHEN A. EILAND,
Respondent.

ON APPEAL FROM THE ELEVENTH CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Should this Court deny certiorari of a judgment of the Eleventh Circuit Court of Appeals which (a) did not conflict with a decision of another federal appeals court or state court of last resort, and (b) decided a question of federal law which has been settled by this court?

2. Should this Court deny certiorari of a judgment of the Eleventh Circuit Court of Appeals as to which a petition for rehearing was denied without a request that said Court be polled?

3. Should this Court deny certiorari of a judgment of the Eleventh Circuit Court of Appeals which followed this Court's ruling in *Connick v. Myers,* 461 U.S. 138, 1035 S.Ct. 1684, 75 L.Ed.2d 708 (1983)?

PARTIES

The petitioners in this proceeding are Emory Folmar, Mayor of Montgomery, Alabama, and the City of Montgomery, Alabama, Defendants-Appellees in the District Court and the Court of Appeals.

The respondent in this proceeding is Stephen A. Eiland, Plaintiff-Appellant in the District Court and the Court of Appeals.

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STATEMENT OF THE CASE

On 24 October 1983, after he admitted to posting a poem at Montgomery police headquarters which criticized the mayor and his personnel policies, Corporal Stephen A. Eiland was demoted to the rank of police officer with a decrease in pay. He filed a lawsuit in January, 1984, charging the aforenamed defendants-petitioners with violations of the First, Fifth, and Fourteenth Amendments to the United States Constitution. He also named the Montgomery City-County Personnel Board as a party defendant, but moved to dismiss the Board before trial. The poem is reproduced at page 3 of the Petition for Certiorari.

After trial on 1-5 April 1985 on the First Amendment claim only, the Court considered briefs from both sides as to whether the poem was constitutionally protected as a matter of law. In a conference in chambers, the Court indicated that it would make a finding of law that the poem had two subjects—one of which, the mayor, was constitutionally protected while the other of which, i.e. the bodyguards, was not.

During the chambers conference, counsel for the Plaintiff *and* the Defendants objected to the Court's division of the poem into two different subject matters. Counsel for the Plaintiff argued that the poem should be treated as a writing about the mayor in its totality and that, as a matter of law, it was constitutionally protected. Counsel for the Defendants argued that the poem was a writing about the mayor's bodyguards (Eiland's fellow police officers) and that, as a matter of law, it was not constitutionally protected.

Before the jury was instructed, the Court issued an Order on 4 April 1985, including that legal finding, which served as one of the premises of its jury charge. That Order is reproduced at page A-1 through A-9 of the Petition for Certiorari.

In its charge to the jury, the Court instructed them as a matter of law that "references in Eiland's poem to Mayor Folmar" were constitutionally protected, while "the reference in Eiland's poem to the mayor's aids or bodyguards was not constitutionally protected speech". The jury was then instructed to make a finding of fact as to the reason for Eiland's discipline—either for references to the mayor or references to the bodyguards. The Court did not identify, specify, or otherwise define in its Order or in its charge which words, lines or phrases referred to the mayor or which words, lines or phrases referred to the bodyguards. The jury found in favor of the Defendants, and the Plaintiff appealed the Court's judgment.

Applying the plain error standard of review, the Eleventh Circuit Court of Appeals reversed the District Court and remanded for a determination of the appropriate remedy. On remand, the Court determined that Eiland was entitled to reinstatement to his position as corporal and to backpay totalling $12,187.97. Eiland was reinstated effective 1 January 1987, and the award of backpay and damages has been suspended pending this Court's disposition of the Petition of Certiorari.

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SUMMARY OF ARGUMENT

The petitioners' request for Writ of Certiorari should be denied because (1) the court of appeals followed this Court's ruling in *Connick v. Myers,* 461 U.S. 138, 1035 S.Ct. 1684, 75 L.Ed.2d 708 (1983), (2) the judgment of the court of appeals does not conflict with decisions of other federal appeals courts, (3) the court of appeals decided a federal question which has been settled by this Court, and (4) the court of appeals correctly held that the poem was a constitutionally protected writing in its totality.

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ARGUMENT

I. The Court Of Appeals Decision Did Not Conflict With Other Federal Appeals Courts And It Decided A Question Of Federal Law Which Has Been Settled By This Court.

Two of the considerations this Court makes in determining whether to grant certiorari review are the extent to which a difference of opinion or interpretation exists among the circuit courts of appeal and whether the question of federal law has been settled by this Court. Rule 17, Rules of the Supreme Court of the United States. Application of those considerations to the instant case portends a denial of the petition.

This Court has declared that "[f]or at least 15 years, it has been settled that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression.

Connick v. Myers, supra, at 1687.[1] Thus, the state's interests and the employee's interests in such cases have been well-defined and consistently articulated for two decades now.

The decisions which this Court has promulgated in the interim have not changed *Keyishian's* mandate, and one year after *Keyishian, supra,* this Court established the analytical framework within which first amendment issues are resolved in *Pickering v. Board of Education,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). *Pickering's* standards have been consistently upheld.

Although *Pickering* was followed by several landmark first amendment decisions in this Court,[2] the assumption of jurisdiction in those instances has been designed to correct a misapplication below or to confirm a correct application below, not to resolve a dispute among circuits or to interpose new standards.

Only causation, as an analytical component, has been treated with new blood since *Pickering.* In *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), this Court established the "but for" test to be applied once the *Pickering* balancing tests have been considered. The court of

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[1]Citing *Keyishian v. Board of Regents,* 385 U.S. 589, 605-606, 87 S.Ct. 675, 684-685, 17 L.Ed.2d 629 (1967).

[2]See *Police Department of Chicago v. Mosley,* 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972); *Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Givhan v. Western* Line Consolidated School District, 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979); *Carey v. Brown,* 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980).

appeals correctly determined that application of *Mt. Healthy* was not warranted because "all of the evidence adduced below was uncontradicted in indicating that the poem was the cause of Eiland's reassignment" *Eiland v. City of Montgomery*, 797 F.2d 953, 960 (11th Cir. 1986); See Petition for Certiorari, at A-24.

The several courts of appeals, by now well-acquainted with first amendment analysis, have followed the mandates of this Court. Any differences among them are not attributable to inconsistent standards, but rather to the "obligation [in first amendment cases] to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499, 104 S.Ct. 1949, 1958, 80 L.Ed.2d 502 (1984).[3]

II. The Eleventh Circuit Decision Is A Firm Decision Which Reflects An En Banc Determination Of The Issues.

The Suggestion for Rehearing En Banc was denied in the court of appeals. Rule 26, Rules of the United States Court of Appeals for the Eleventh Circuit. Of the three possible procedures which lead to such denials in the Elev-

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[3]See *Fiorillo v. U.S. Dept. of Justice, Bureau of Prisons*, 795 F.2d 1544 (Fed. Cir. 1986); *McMullen v. Carson*, 754 F.2d 936 (11th Cir. 1985); *Wren v. Spurlock*, 798 F.2d 1313 (10th Cir. 1986); *Matter of Yagman*, 796 F.2d 1165 (9th Cir. 1986); *Zaky v. U.S. Veterans Administration*, 793 F.2d 832 (7th Cir. 1986); *Marohnic v. Walker*, 800 F.2d 613 (6th Cir. 1986); *McAdams v. Matagorda County Appraisal District*, 798 F.2d 842 (5th Cir. 1986); *Johnson v. Town of Elizabethtown*, 800 F.2d 404 (4th Cir. 1986); *Gaj v. U.S. Postal Service*, 800 F.2d 64 (3rd Cir. 1986).

enth Circuit, the route taken by the court in this case placed the imprimatur of every "Judge in regular service on the Court" upon an already strong, unequivocal decision. See Appendix, at A-1, *infra.*

None of the active appellate judges even *requested* that the court be polled on the rehearing request. Thus there is apparently no doubt in the circuit about the standards which should have been applied or the wisdom of the panel's application.[4]

This Court should deny the petition for this reason as well.

III. The Court Of Appeals Decision Followed This Court's Ruling In Connick v. Myers.

Connick v. Myers, supra, did not create new case law, overrule previous decisions or set new standards for judicial analysis of the constitutional protection to be afforded to statements made by public employees. Instead, the decision reiterated and affirmed this Court's well-established, individualized approach to First Amendment analysis most memorably articulated in *Pickering v. Board of Education,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

For purpose of the case *sub judice,* the most important component of the *Connick* analysis is that this Court *did*

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[4]The court of appeals noted that its pre-*Connick* and post-*Connick* analyses were consistent. 795 F.2d at 958. Significantly, this Court has left undisturbed some of the Eleventh Circuit's post-*Connick* rulings. See *Berry v. Bailey,* 726 F.2d 670 (11th Cir. 1984), *cert. denied,* — U.S. —, 105 S.Ct. 2326; 85 L.Ed.2d 844 (1985); *Leonard v. City of Columbus,* 705 F.2d 1299 (11th Cir. 1983), *cert. denied,* 468 U.S. 1204, 104 S.Ct. 3571, 82 L.Ed.2d 870 (1984).

not assess the constitutional protection to which the individual questions on the Myers questionnaire were entitled. The Court's consideration of individual questions was for the sole purpose of determining the extent to which each addressed a matter of public concern, *not* to bestow incidental constitutional protection upon each inquiry, as the District Court did in the instant case.

The court of appeals found that "the district court started its analysis on the wrong foot by determining that the poem had two distinct and separable subjects". 797 F.2d at 957. (Petition for Certiorari, p. A-18). Further, the court of appeals correctly concluded that "[t]he *Connick* decision . . . did not apply the *Pickering* balancing test to each individual question . . ., but rather, the [Supreme] Court appeared to weigh the first amendment interests of Myers *in the questionnaire as a whole* against the interests of *Connick*". 795 F.2d, *supra*. [Emphasis supplied].

Of equal significance is *Connick's* perpetuation of the principle that first amendment analyses are not formulaic.[5] Citing *Pickering, supra,* at 1735, this Court confirmed that

> "[b]ecause of the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their superiors . . . to furnish grounds for dismissal, we do not deem it either appropriate or feasible to lay down a general standard against which all such statements may be judged". *Connick, supra,* at 1694.

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[5]The Eleventh Circuit was not alone in its ban on topical dissection of writings before application of the *Pickering/Mt. Healthy* tests. In *Fiorillo v. U.S. Dept. of Justice, Bureau of Prisons, supra,* a public employee's statements to the press were analyzed as a whole, rather than on a sentence-by-sentence basis. 795 F.2d at 1550.

The district court's departure from the holistic approach embraced by this Court led to its erroneous application of *Pickering, Mt. Healthy,* and *Connick.* The court of appeals reinstated the appropriate analysis under which constitutional protection to the *whole* of Corporal Eiland's poem was inevitable.

CONCLUSION

The Petitioners have proffered no good and substantial reason why this Court should grant the petition. Instead, the proper interpretation of first amendment decisions was applied in the court of appeals in an opinion which was apparently unanimously received in that court and which created no conflicts with other circuits.

The law is well-settled, and the petition should be denied.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-7295

STEPHEN A. EILAND,

Plaintiff-Appellant,

versus

THE CITY OF MONTGOMERY, a municipal corporation; and EMORY FOLMAR, Ind. and in his official capacity as Mayor of the City of Montgomery,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Alabama

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion August 26, 11 Cir., 1986, — F.2d —).
(OCT 6 1986)

Before KRAVITCH and HATCHETT, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
United States Circuit Judge